

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7599

Joint Petition of Northern New England Telephone)
Operations LLC, Telephone Operating Company of)
Vermont LLC, d/b/a FairPoint Communications,)
Enhanced Communications of Northern New England,)
Inc., and FairPoint Vermont, Inc. (collectively,)
"FairPoint"), for (1) approval of an indirect acquisition)
of a controlling interest; (2) approval of a Settlement)
between the Department of Public Service and FairPoint;)
(3) approval of the modification of certain Certificates of)
Public Good issued in Docket 7270; and (4) approval of)
certain other transactions

Order entered: 6/30/2011

ORDER EXTENDING DEADLINE FOR BROADBAND EXTENSION

I. INTRODUCTION

On June 20, 2011, Northern New England Telephone Operations LLC, Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications, Enhanced Communications of Northern New England Inc., and FairPoint Vermont, Inc. (collectively, "FairPoint") filed a motion, pursuant to Rule 60 of the Vermont Rules of Civil Procedure, seeking an extension of time to comply with certain requirements related to the expansion of broadband services. FairPoint asks that the Vermont Public Service Board ("Board") extend the June 30, 2011, deadline by which FairPoint must make available broadband service to 95% of its customers in half of its exchanges for one month in the Grand Isle and St. Albans Exchanges

without incurring the associated penalties.¹ FairPoint represents that the Department of Public Service ("Department") supports the requested relief.

In today's Order, the Board grants FairPoint's motion.

II. BACKGROUND

On February 15, 2008, the Board approved, with conditions, the proposed merger transaction under which the landline telephone assets and business formerly operated by Verizon New England, Inc. et al ("Verizon") were transferred to FairPoint. In approving the transaction, the Board relied in part on an agreement between the Department and FairPoint, under which FairPoint made numerous commitments and enhancements to the original acquisition proposal. One of those commitments was FairPoint's agreement to the Consistent Coverage broadband expansion plan, under which FairPoint would provide 100% broadband capability in at least half of the exchanges it serves.² This commitment was embodied in Paragraph 20 of the Merger Order (and Paragraph 15 of Attachment 1 to that Order), which reads (in pertinent part):

While meeting the statewide availability commitments for broadband set out in the Incentive Regulation Plan, FairPoint shall also provide broadband service to all access lines in at least 50% of its exchanges by the end of 2010.³

FairPoint also agreed to a Performance Enhancement Plan ("PEP") as part of its settlement with the Department. The PEP included provisions specifying the penalties that FairPoint would be obligated to pay if it failed to meet the broadband deployment commitments. The Merger Order described these commitments as follows:

FairPoint would be penalized \$1 million annually at the end of 2008, 2009, and 2010 if it has not met the current broadband deployment milestones applicable to Verizon (75% by 12/31/08; 77% by 12/31/09; 80% by 12/31/10). Second,

1. The penalties are referenced in the Board's February 15, 2008, Order approving FairPoint's acquisition of the landline service territory previously owned by Verizon New England, Inc., d/b/a Verizon Vermont ("Verizon"), (in today's Order, we refer to the February 15, 2008, Order as the "Merger Order"). Paragraph 20 of the Merger Order, and Paragraph 15 of Attachment 1 ("Attachment 1") to the Certificates of Public Good issued therewith in Docket No. 7270, set out FairPoint's broadband build-out obligations. Those conditions were subsequently modified by Paragraphs 3 and 4 of the Board's Order of December 23, 2010, in this docket, and in the Amended Certificate of Public Good issued therewith.

2. See, Docket No. 7270, Order of 2/15/08 at 8.

3. Docket No. 7270, Order of 2/15/08 at 42.

FairPoint would be penalized \$350,000 for each exchange by which the Consistent Coverage Plan is not met as of December 31, 2010, up to a maximum of \$9 million.⁴

Following the acquisition of Verizon's Vermont landline business, and the significant service quality failures that ensued after FairPoint switched from using Verizon's systems to its own newly designed ones, FairPoint faced severe financial difficulties. As we have documented in previous orders in this docket, these led to FairPoint filing for protection under Chapter 11 of the federal Bankruptcy Code in October of 2009. In the bankruptcy proceeding, FairPoint developed a Plan of Reorganization and entered into a "Post Filing Regulatory Settlement - Vermont", dated as of February 5, 2010 (the "Regulatory Settlement"), with the Department. FairPoint sought approval for (among other things) its Plan of Reorganization and the Regulatory Settlement. The Regulatory Settlement included provisions that would adjust FairPoint's broadband expansion obligations under the previous agreement in Docket No. 7270 with the Department, which the Board had incorporated into the Merger Order.

The Board granted FairPoint's requested approvals in its Order dated December 23, 2010, in this docket. As part of that approval, the Board accepted the Regulatory Settlement and the adjustments to FairPoint's broadband expansion obligations embodied therein. The revised conditions were set out in Paragraphs 3 and 4 of the December 23, 2010, Order. Paragraph 3 states, in pertinent part (emphasis added):

The broadband milestone penalties contained in the Order of February 15, 2008, in Docket No. 7270 (the "2008 Merger Order"), if any, will not be enforced prior to June 30, 2011, provided that (a) FairPoint filed with the Board, the Department, and/ or any other appropriate regulatory body: (i) a broadband permitting and construction plan by May 1, 2010; and (ii) all necessary permit applications prior to October 1, 2010; and (b) undertakes all commercially practicable efforts to implement the plan.

Paragraph 4 states, in pertinent part:

For those exchanges in which FairPoint had committed to make broadband available to 100% of the access lines pursuant to the 2008 Merger Order, FairPoint will build out to 95% of those lines within the timeframe indicated in Paragraph 3, above

4. Docket No. 7270, Order of 2/15/08 at 23.

III. THE MOTION

FairPoint argues that during the spring of 2011, Lake Champlain's record high water level caused widespread flooding along the shoreline. According to FairPoint, during May and June 2011, these water levels exceeded the maximum known elevation on record going back to at least 1827.⁵ As a result of this flooding, FairPoint cannot access many locations along the shoreline, since they are underwater. In particular, FairPoint represents that the flooding has made it impossible to access four remote terminals ("RTs" or an "RT") – two in the Grand Isle Exchange and two in the St. Albans Exchange – where it needs to install fiber to achieve the broadband commitment.⁶ FairPoint states that to meet the 95% broadband availability target in these two exchanges by the June 30, 2011, deadline, FairPoint must be able to access these RTs and complete all of its required construction work. As of the time of the motion, the flooding had not subsided and FairPoint remained unable to access the four identified RTs. FairPoint states that if conditions improve such that FairPoint can access these areas, FairPoint will attempt to make up for lost time and complete the work before the June 30, 2011, deadline. But due to the uncertainties as to access to the RTs, FairPoint requests that the Board extend, until July 31, 2011, the date by which FairPoint must achieve its 95% broadband availability target in the Grand Isle and St. Albans Exchanges without incurring the penalties referenced in the 2008 Merger Order.

Finally, FairPoint commits to expeditiously completing the broadband expansion project in the affected exchanges. However, due to the uncertainty as to access, FairPoint observes that it might seek an additional extension of the deadline from this Board in the event conditions do not improve.

5. See Attachment 1 (USGS Chart indicating Lake Champlain's unprecedented, record high water levels from May through June 2011).

6. See Attachment 2 to FairPoint's Motion.

IV. DISCUSSION

The Board grants FairPoint's Motion for a one-month extension of the obligation to extend broadband service to 95% of access lines in the Grand Isle and St. Albans exchanges. We would normally expect companies to take weather conditions into account in planning their construction efforts to meet regulatory obligations. However, we agree that the record-setting flooding around Lake Champlain, and the persistence of that flooding, represents a severe weather event that would be difficult to anticipate and plan for. Accordingly, we find good cause to modify FairPoint's broadband commitment.

SO ORDERED.

Dated at Montpelier, Vermont, this 30th day of June, 2011.

<u>s/James Volz</u>)	
)	
)	PUBLIC SERVICE
<u>s/David C. Coen</u>)	
)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED:

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.